Supreme Court, U.S.
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No. 95-1768

In The

Supreme Court of the United States

October Term, 1995

JOE BALLARD,

Petitioner,

-against-

AIRPORT COMMISSION; CITY OF NEWPORT, ARKANSAS; WAYNE BEARD, JR.; WILEY ALLBRIGHT, JR.; TERRY DILLON; RALPH FORD SINK; KENNETH THAXTON, JR.; BURTON FORD,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER THE EIGHTH CIRCUIT'S HOLDING THAT THE DISTRICT COURT'S FINDINGS OF FACT, THAT THE RESPONDENT/EMPLOYER DID NOT DISCRIMINATE ON THE BASIS OF AGE IN TERMINATING PETITIONER BALLARD WAS CLEARLY ERRONEOUS.

PARTIES TO THE PROCEEDING

Joe Ballard, Petitioner.

Respondent Wayne Beard, Jr., was at all relevant times herein the Mayor of the City of Newport.

Respondent Wiley Allbright, Jr., was at all relevant times herein, Chairman of the Airport Commission for the City of Newport.

Respondent Terry Dillon, was at all relevant times herein a Commissioner for the Newport Airport Commission.

Respondent Ralph Ford Sink, was at all relevant times herein a Commissioner for the Newport Airport Commission.

Respondent Kenneth Thaxton, Jr., was at all relevant times herein a Commissioner for the Newport Airport Commission.

Respondent Burton Ford, was at all relevant times herein a Commissioner for the Newport Airport Commission.

Respondent City of Newport, Arkansas/Newport, Arkansas Airport Commission, is the governing body that employed Petitioner Ballard.

There are no other parties to this action.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 2

REASONS FOR DENYING THE WRIT 4

I. THE PETITION SHOULD BE DENIED BECAUSE IT SEEKS ONLY TO REVIEW FACTUAL FINDINGS AND A PROPERLY STATED RULE OF LAW 4

II. THE EIGHTH CIRCUIT'S HOLDING THAT THE DISTRICT COURT'S FINDING OF FACT THAT THE DEFENDANTS DID NOT DISCRIMINATE AGAINST BALLARD BECAUSE OF HIS AGE WAS NOT CLEARLY ERRONEOUS 5

A. Standard of Review 5

B. The Evidence at Trial Overwhelmingly Established a Legitimate, Nondiscriminatory Motive for Terminating Ballard 6

1. Burden of Proof 6

2. Ballard's "Image" 2

3. Legitimate Reasons for Termination .. 10

III. NEITHER THE TRIAL COURT NOR THE COURT OF APPEALS ERRED IN DECLINING TO APPLY A MIXED-MOTIVE ANALYSIS 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 15

Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104 (8th Cir.), *cert. denied*, 115 S. Ct. 355 (1994) 6

Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983) 10

Hillman v. Arkansas Highway & Transp. Dept., 39 F.3d 197 (8th Cir. 1994) 6

Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995) 14

Krenik v. County of Le Sueur, 47 F.3d 953 (8th Cir. 1995) 7

Moses v. Falstaff Brewing Corp., 550 F.2d 1113 (8th Cir. 1977) 9

Mullins v. Uniroyal, Inc., 805 F.2d 307 (8th Cir. 1986) 5, 6

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 14

Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444 (8th Cir. 1993) 15

Richmond v. Board of Regents of University of Minnesota, 957 F.2d 595 (8th Cir. 1992) 10

St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993) 7

Wilson v. US West Communications, 58 F.3d 1337 (8th Cir. 1995) 6

CONSTITUTIONS, STATUTES AND RULES

29 U.S.C. § 623(f)(1) and (3) 10

Fed. R. Civ. P. 52(a) 5

Sup. Ct. R. 10 ..... 4, 5

TO THE HONORABLE UNITED STATES SUPREME COURT:

Respondents respectfully submit this brief in support of their request that this Court deny the Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Respondent City of Newport Airport Commission (hereinafter Defendant, Commission, or individual Respondent surname) hired the Petitioner (hereinafter Plaintiff or Ballard) in 1981 for the position of Airport Manager. Findings of Fact, TR 158, J.A. 44.[1] His primary duties were to sell fuel, give wind directions, landing advice, maintain the grounds, collect hangar rent and keep records of sales. *Id.* Ballard was discharged on November 20, 1992. J.A. 21. He was seventy-two years of age at the time. *Id.* Dorsey Block was hired to replace Mr. Ballard. TR 47, S.A. 4.

The District Court found that the Plaintiff had established a prima facie case as he was in the protected age

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[1] The following abbreviations are used herein:

TR – Trial transcript

J.A. – Joint Appendix

S.A. – Appellees' supplemental appendix.

Petitioner failed to attach the Court's Findings of Fact and thus, Respondents are forced to cite from the transcript filed with the Court of Appeals.

group and was replaced by a younger man. TR 158-59, J.A. 44-45. However, the District Court found that the airport advanced legitimate, non-discriminatory reasons for terminating Ballard. TR 159, J.A. 45. The District Court cited evidence that the housekeeping at the airport was not adequate; that the equipment was not being properly maintained; that the grass was not being mowed on time; that logs and documentation of the activities of the airport were not kept as required; that the pilots' lounge was not properly kept up and maintained; and that the plaintiff's relations with the public were unsatisfactory. *Id.* Consequently, after a bench trial, the trial court entered judgment for the Defendants. Plaintiff appealed the District Court's ruling on grounds that the decision was clearly erroneous. The Court of Appeals for the Eighth Circuit affirmed the District Court's findings, specifically holding that the trial judge did not clearly err in deciding the case. The Eighth Circuit also rejected Plaintiff's "mixed motive" argument, finding that the Plaintiff failed to meet his proof.

SUMMARY OF THE ARGUMENT

This case involves a challenge to the Eighth Circuit Court of Appeals' affirmance of the District Court's finding that the Newport Airport Commission did not discriminate against Joe Ballard when it terminated his employment as the Airport Manager. Ballard attacks the decision as "clearly erroneous." However, Ballard is unable to make the necessary showing that the decision was unsupported by substantial evidence, based on an erroneous interpretation of applicable law, or, in light of

the entire record, that this court should be left with a firm and definite conviction that a mistake has been made. Thus, Petitioner's Writ runs afoul of Supreme Court Rule 10.

Although the trial court found that Ballard had made a prima facie case, the court also correctly found that the Commission articulated a legitimate non-discriminatory motive for termination. Ballard attempted to prove that dissatisfaction with his "image" was the reason behind his termination, and that by "image", the Commission was referring to his age. However, there was literally no evidence that the term "image" referred to Ballard's age. Rather, the Commissioners used that term to refer to Ballard's failure to properly maintain the Airport terminal and grounds; and to his rudeness towards members of the public who used the airport. The only "evidence" that Ballard was able to muster was his own testimony speculating that he "figured" that the Commission wanted a younger person for the job.

The true reasons, as noted by the District Court, for Ballard's termination was that he failed to maintain the terminal, airport, and equipment in a satisfactory condition; he was rude to users of the airport; and repeatedly failed to follow directions from the Commission. The evidence showed, among other things, that the Airport was dirty and infested with mice. The runways were not kept clean of rocks. The pilot's lounge was kept locked in direct contravention of the Commission's request to keep it open. Ballard failed to keep logs as required by the Commission, took checks from an individual whose checks often did not clear after being requested not to do

so, and failed to follow bookkeeping procedures requested by the Commission and its accountant.

Ballard does not actually challenge any of the foregoing evidence except as to say that it is insufficient to support judgment for the Defendants, except to note that the judgment was clearly erroneous. Additionally, he takes issue with the District Court's supposed failure to apply a "mixed-motive" analysis to his termination, but cites no evidence that would support a reversal by the Court of Appeals on the issue of mixed motive. The District Court did not find a mixed motive, and the record does not reveal that any discriminatory animus entered into the decision to terminate Ballard. To the contrary, the undisputed testimony of the Commission members who testified was that Ballard's age was not discussed in the decision to terminate him and played no part in the decision.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE IT SEEKS ONLY TO REVIEW FACTUAL FINDINGS AND A PROPERLY STATED RULE OF LAW.

Rule 10 of the Supreme Court Rules states in relevant part: "A petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The Rule goes on to say that the granting of a request for certiorari is within this Court's discretion and proceeds to outline various factors that this Court considers in making its decision. *Id.* Those factors include, but are not limited to, whether the circuits are in conflict on an "important

matter," departure from the "accepted and usual course of judicial proceedings," etc. Sup. Ct. R. 10(a). None of the factors outlined therein are present here. Petitioner's request is nothing more than an attack on the factual findings of the District Court, and the application of the clearly erroneous standard by the Eighth Circuit Court of Appeals, both of which are generally prohibited by Rule 10: "A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of the properly stated rule of law." Sup. Ct. R. 10. Petitioner's attack on the clearly erroneous doctrine as applied by the court of appeals is wholly without merit. The clearly erroneous standard is a properly stated rule of law and has been used so frequently that citation is not necessary. Plaintiff's Petition for Writ should be denied for its failure to comply with Rule 10. Alternatively, should the Court feel it necessary, Respondents have addressed the merits of Petitioner's claims below.

II. THE EIGHTH CIRCUIT'S HOLDING THAT THE DISTRICT COURT'S FINDING OF FACT THAT THE DEFENDANTS DID NOT DISCRIMINATE AGAINST BALLARD BECAUSE OF HIS AGE WAS NOT CLEARLY ERRONEOUS

A. Standard of Review

A District Court's determination that an employer's actions were not discriminatory is a finding of fact. *Mullins v. Uniroyal, Inc.*, 805 F.2d 307, 308 (8th Cir. 1986). Fed. R. Civ. P. 52(a) provides that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be

given to the opportunity of the trial court to judge of the credibility of the witnesses." Under the clearly erroneous standard, reversal is proper only if the decision was "unsupported by substantial evidence, based on an erroneous interpretation of applicable law, or, in light of the entire record, [the court is] left with a firm and definite conviction that a mistake has been made." *Hillman v. Arkansas Highway & Transp. Dept.*, 39 F.3d 197, 200 (8th Cir. 1994). An appellate court may not reverse merely because it might decide the case differently were it to review the evidence de novo. *Mullins*, 805 F.2d at 308. When findings are based on credibility determinations, they are given great deference. *Wilson v. US West Communications*, 58 F.3d 1337, 1340 (8th Cir. 1995). In affirming the District Court in this matter, the Eighth Circuit Court of Appeals properly applied this standard, and there is no valid reason to review its decision.

B. The Evidence at Trial Overwhelmingly Established a Legitimate, Nondiscriminatory Motive for Terminating Ballard

1. Burden of Proof

In order to establish a case of age discrimination, the plaintiff must prove the four elements of a prima facie case: (1) that he is a member of the protected class; (2) that he was performing adequately in his job; (3) that he was fired, and (4) that he was replaced by a younger person after his dismissal. *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1109 (8th Cir.), *cert. denied*, 115 S. Ct. 355 (1994). If the plaintiff succeeds in making out a

prima facie case, a rebuttable presumption of discrimination is created. *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995).

The burden then shifts to the defendant to rebut the presumption by producing evidence of a legitimate, nondiscriminatory reason for the challenged employment action. *Id.* This is merely a burden of production, not of proof. *Id.* In order to carry its burden, the defendant need not persuade the court, but merely provide evidence sufficient to sustain a judgment in its favor. *Id.*

If the defendant carries its burden of production, then the burden shifts back to the plaintiff to establish that the defendant's proffered reason is pretextual and that the true reason was intentional discrimination. *Id.* (citing *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993)). In order to establish pretext, the plaintiff must produce some additional evidence beyond the elements of the prima facie case. *Krenik*, 47 F.3d at 959.

In this case, the District Court found that Ballard had established a prima facie case, on the grounds that "he is in the protected age group, which is anyone over forty, and he was replaced by a younger man."[2] J.A. 12-13; Appellant's Add. 35-36. However, the District Court found that the airport advanced legitimate, non-discriminatory reasons for terminating Ballard. TR 159, J.A. 13. The District Court found and the court of appeals relied on evidence that the housekeeping at the airport was not

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[2] The court did not, however, make a finding on the second element of a prima facie case, that the plaintiff was performing his job adequately.

adequate; that the equipment was not being properly maintained; that the grass was not being mowed on time; that logs and documentation of the activities of the airport were not kept as required; that the pilots' lounge was not properly kept up and maintained; and that the plaintiff's handling of public relations was unsatisfactory to the Airport Commission [hereinafter "Commission"]. *Id.*

The District Court concluded that Mr. Ballard had not sustained his burden of proof, and that the defendants had submitted "a great deal of proof" for each of the proffered reasons for discharge. *Id.* at 160, J.A. 14. The court found that the plaintiff on the other hand, "really [didn't] have any proof. It [was] just something that he [had] speculated about." *Id.* The court concluded that "the plaintiff [had] simply not sustained his burden of proof of showing age discrimination on his whole case." *Id.* The District Court's findings were amply supported by the evidence, as the following discussion will show.

2. Ballard's "Image"

Ballard attempted at trial to show that his termination was based on his age because of a comment that the Commissioners were unhappy with his "image." *See* TR 44, S.A. 2. However, Commissioner Ford testified that it was "totally inaccurate" that the Commissioners were unhappy with Ballard's image because he was in his 70's. TR 46, S.A. 3. Mr. Ford never heard or participated in any conversation with other Commissioners where Mr. Ballard's image was discussed in connection with his chronological age. TR 51, S.A. 6. Commissioner Ford stated

that, in using the word "image" he was not talking about Ballard's age. Rather he was "talking about the image of the airport and what we were trying to portray for prospective industrial customers coming into town." TR 115, S.A. 29. Ford also testified that, when the Commission decided to terminate Ballard, his age was not mentioned. *Id.*

Mr. Allbright, Commission chair, did not know how old Ballard was, and even thought that he, Allbright, was older than Ballard. TR 59, S.A. 7. He corroborated Ford's testimony, stating that "age was never mentioned" in the determination to terminate Ballard. TR 68-69, 77, S.A. 8-9, 12. It played no part in the Commission's decision to terminate him. TR 104-05, S.A. 23-24. When Mr. Allbright used the word "image", he was not talking about Ballard's age, "at all", but rather the way he treated people and talked to them. TR 98, S.A. 19. On cross-examination, Allbright denied that Ballard's age was a factor in his "image problem" stating, "I'm almost as old as Joe and I don't have that problem. I don't have a problem getting along with people." TR 110, S.A. 26.

The foregoing evidence went completely uncontradicted. Ballard testified he figured that "because of my image, older image, [that] they wanted a younger person, is all I know." TR 152, S.A. 42. On the other hand, Ballard admitted that no one ever told him he was fired because of his age. TR 151-152, S.A. 41-42. He did not recall any member of the airport Commission ever making any comments to him about his age other than one question about how old he was. TR 152, S.A. 42. Nobody told him that they wanted a younger person. TR 153, S.A. 43. This was something he just concluded on his own. *Id. See Moses v.*

Falstaff Brewing Corp., 550 F.2d 1113, 1115 (8th Cir. 1977) (no evidence of statements indicating age a factor in employee's termination).

The District Court correctly concluded that the use of the word "image" did not imply that the Commission was basing its decision to terminate Ballard based on his age. TR 160, J.A. 14. As the court observed, Ballard "really [didn't] have any proof. It [was] just something that he [had] speculated about." *Id.* Given the Commission's evidence, and the lack of any evidence of discrimination from Ballard, the District Court's finding on this issue was far from erroneous, and the court of appeals' affirmance is plainly correct.

3. Legitimate Reasons for Termination

The uncontradicted evidence showed a host of problems with Ballard's job performance. The Age Discrimination in Employment Act provides that an employer does not violate the Act by terminating an employee "based on reasonable factors other than age," or "for good cause." 29 U.S.C. § 623(f)(1) and (3). Poor job performance constitutes a legitimate, nondiscriminatory reason for termination. *Richmond v. Board of Regents of University of Minnesota*, 957 F.2d 595, 598 (8th Cir. 1992); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 291 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983).

The Commissions' complaints fall generally into three categories: (1) failure to maintain the airport properly; (2) rudeness to members of the public using the airport; and (3) failure to follow repeated instructions.

Allbright testified that the upkeep of the terminal and the grounds was deteriorating. TR 93, S.A. 15. This started in 1990 or 1991. TR 93-94, S.A. 15-16. The airport building had "trash or old magazines, things of that nature. It was just not kept in an orderly manner, and the floor was beginning to be dirty most of the time. The restrooms were dirty. . . . " TR 108, S.A. 25. Allbright stated that he told Ballard "to get the terminal building looking in better shape." It would improve for a few days but by the next meeting it would be back like it was. TR 94, S.A. 16. Burton Ford also testified that the Commission "had a problem with the looks of the airport and we felt like that was a very important part of the job. We weren't getting cooperation with what we were asking for." TR 112, S.A. 27. Ford stated that the terminal was generally in a cluttered condition. TR 113, S.A. 28. There were problems with the appearance of the airport and the grass was growing too tall. TR 32, S.A. 1. At times, the grass got so tall it was "tearing up the machinery." *Id.*

Another problem arose from Ballard's failure to keep the pilot lounge open. The Commission wanted to have a nice pilot lounge as it is often boring and uncomfortable for a pilot waiting for a passenger at the airport. The Commission thought this was very important. TR 113, S.A. 28. Nevertheless, Ballard kept the pilots' room locked and unavailable to the pilots. TR 94-95, 16-17. This was mentioned at Commission meetings to Ballard a couple of times, but even so it was not kept open on a regular basis. TR 95, S.A. 17.

Since the new manager was hired, the office area is "much, much cleaner." TR 116, S.A. 30. The pilot's lounge is well maintained and kept open. There is generally a

better looking appearance on the taxiways and apron areas. Previously with Mr. Ballard there had been a problem with sweeping and vacuuming the runways and keeping them clean of rocks. *Id*. The new manager observed that, when he was hired, "the equipment, the mowers, the tractors, were all in need of repair. The clutch was out on the tractor and on the mower. There was no way to do any mowing with it." TR 142, S.A. 37. The airport terminal building was infested with mice and needed general cleaning. TR 142-43, S.A. 37-38. In addition, a small cutter needed repair, the runway lights didn't work, the wind directional didn't work and the "wind speed" didn't work. TR 143, S.A. 38.

As already noted, Ballard was rude to members of the public using the airport. Allbright testified that he did not like Ballard's "general attitude towards people that were coming . . . into the airport." TR 68, S.A. 8. Ballard got to the point where he was "kind of gruff with people" which reflected badly on the airport. TR 95, S.A. 17. Since Ballard was often the first person that somebody coming in from out of town would see, anything that he said would reflect on the whole city. *Id*. Allbright testified that the public relations aspect was an important part of Ballard's job. TR 95-96, 17-18. He testified that an "industrial person" was glad when Ballard was terminated because he thought that Ballard "didn't come on to people, . . . " TR 108, S.A. 25. Danny Howard also testified that Ballard was rude to "a lot of people." TR 123-24, S.A. 31-32.

Finally, Ballard simply failed to follow directions. TR 50-51, S.A. 5-6. Sometimes the Commissioners would have to repeat directions to Ballard at two or three consecutive monthly meetings. TR 51, S.A. 6. For example,

the Commissioners instructed Ballard to keep a log on the matters which he felt needed discussion. Ballard was advised to keep a log showing dates, times and locations. TR. 99, S.A. 20. However, Ballard did not keep the log as requested. TR 99-100, 101, S.A. 20-21, 22. Similarly, Burton Ford testified that Ballard failed to keep documentation as requested on problems with agricultural operators. TR 112-113, S.A. 27-28. The Commission could not perform any follow-up because it did not have any documentation with which to do it. TR 113, S.A. 28.

In another example, the Commission instructed Ballard to stop taking checks from a Mr. Breckenridge because they were having trouble getting the checks to clear. TR 70, S.A. 10. Nevertheless, Ballard kept taking Breckenridge's checks after the Commissioners told him not to. TR 70-71, S.A. 10-11. Although the checks were all eventually made good, TR 71, Ballard had nevertheless simply disobeyed his employer's instructions.

Ballard also failed to follow instructions with respect to bookkeeping procedures. Jim Block, the accountant for the Commission, (TR 131, S.A. 33), testified that he had difficulty getting Ballard to keep accurate financial records of sales. TR 133-134, S.A. 34-35. Block had to tell Ballard repeatedly to cut off financial information at the end of the month. *Id*. It took months before Ballard would keep an accounts receivable ledger. TR 136, S.A. 36. Ballard would not count daily cash even when he was requested to do so by the Commission. *Id*.

The foregoing evidence is more than sufficient evidence to establish a legitimate, nondiscriminatory motive. Ballard failed to produce any evidence that these reasons

were pretextual. As a result, this case is "precisely the type of employment dispute that this court has repeatedly stated is not covered by the discrimination laws." *See Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995). The court of appeals is not to sit as a super personnel department to review the fairness or wisdom of employers' business judgments in the absence of intentional discrimination. *Id.* The District Court had the opportunity to hear the witnesses, and found those for the defense credible. Ballard has advanced no rationale for his conclusion that the trial judge's judgment was "clearly erroneous," or that the Eighth Circuit should have so found.

III. NEITHER THE TRIAL COURT NOR THE COURT OF APPEALS ERRED IN DECLINING TO APPLY A MIXED-MOTIVE ANALYSIS

Ballard next contends that the District Court erred in failing to apply a mixed-motive analysis as set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). That decision permits a plaintiff to persuade the trier of fact that discrimination was more likely than not a part of the motivation for the employment decision at issue. If the plaintiff is successful in making such a showing, then the employer may elude liability only by proving that it would have made the same decision without the discriminatory reason. *Hutson*, 63 F.3d at 780 (citing *Price Waterhouse*, 490 U.S. at 258). As in *Hutson*, Ballard's difficulty is that he never made the prerequisite showing that the Commission's decision to terminate him contained any discriminatory component at all. *See Hutson*, 63 F.3d at 780. Merely establishing a prima facie case is not enough

to justify a mixed motive analysis. *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448-49 (8th Cir. 1993).

> Rather, the plaintiff must present evidence of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision.

Id. at 449 (quotation omitted).

The District Court did not find that the decision to terminate Ballard was partially motivated by discriminatory animus. Nor has Ballard produced any such evidence. He merely argues that both the court of appeals and the District Court "erred" in failing to apply a mixed motive analysis, but never really says why. The closest he comes to proffering an explanation are vague and unsupported accusations against Commission members of "harassment," and nonsensical arguments that the court of appeals did not properly apply the mixed motive test. *Petition for Writ at 14-16.* Ballard provides no concrete examples to explain these mysterious allegations of harassment, which, in any event, simply raise credibility questions that were well within the province of the trial judge. As long as it is internally consistent, a trial judge's credibility determination respecting the testimony of witnesses uncontradicted by extrinsic evidence "can virtually never be clear error." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985). Further, because he has been unable to provide evidence that the employer "more likely than not" acted from a mixed motive, Ballard's argument must fail.

CONCLUSION

The evidence amply supports the District Court's ruling that the Commission advanced a legitimate, non-discriminatory reason for Ballard's termination. Moreover, there was no evidence to support a mixed-motive analysis. Accordingly, the judgment of the District Court and the court of appeals should not be disturbed, and the Petition for Writ denied.

Respectfully submitted,

Airport Commission, City of Newport, AR; Wayne Beard, Jr.; Wiley Allbright, Jr.; Terry Dillon; Ralph Ford Sink; Kenneth Thaxton, Jr.; Burton Ford, Respondents

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